BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF COURTS BELOW.

The opinion of the District Court of the United States, for the Southern District of Iowa, is in the printed transcript of the record at pages 164 to 171, inclusive. The opinion of the Circuit Court of Appeals for the Eighth Circuit is reported in 119 F. (2d) 387. It was handed down on the 17th day of April, 1941.

II.

JURISDICTION.

The date of the judgment or decree to be reviewed is April 17, 1941.

This is a case where we ask this court to grant the writ because it involves a question of local law which has been decided contrary to the decisions of the Supreme Court of Iowa, and it involves a question of great and wide general interest fixing the status of many hundreds of thousands of employees of the Federal Government who are working in the various states.

III.

STATEMENT OF THE CASE.

One Arthur Andrews, a W.P.A. worker, died as a result of injuries received while repairing a bracket on the inside of the elevator shaft in the building of the Y.M.C.A., as the result of the lowering of the cage of the elevator upon him. This bracket was a part of the device used in connection with the opening and closing of the door into the shaft at the basement level.

The case was tried to the Court without a jury, and insofar as the facts are concerned, upon a stipulation of facts appearing in the Record commencing on page 93 and concluding on page 104. Paragraph 35 (p. 100) of that stipulation covers the circumstances under which Andrews was employed at the Y.M.C.A. building. It is there stipulated that in November, 1935, Miss Catherine Krieg, who was at the time the Director of the Des Moines Playground Recreational Commission, informed Mr. Dillon, General Secretary of the Y.M.C.A., that she was being supplied with some twenty-five employees of the W.P.A. under Recreational Project No. 112, and inquired whether or not Mr. Dillon would furnish some labor and work for said employees to do. Mr. Dillon informed her that he would make an effort to do so, and as a result nine of said W.P.A. employees were assigned to her to work at the Y.M.C.A. as directed by it. Arthur Andrews was one of them. He was furnished with various and divers work in the Y.M.C.A. building under the direction and supervision of Ralph W. Anderson, as Building Superintendent. On December 31, 1935, he was assigned by Anderson to make the repair of a bracket on the inside of the door of the elevator shaft in the basement story of said building, and, in so doing, he worked under the direction, supervision and control of said Anderson, as superintendent of the building. It further appears from this stipulation, that during all the time that Andrews worked in the building, the labor and work to be done by him was chosen by and done in the manner directed by said Anderson (Record, pages 100-101).

It was further stipulated that Andrews did not appear on the payroll of the Y.M.C.A. and was not paid by the Y.M.C.A. but that his wages were paid by the W.P.A., that the Y.M.C.A. had no right to discharge him from the rolls of the W.P.A. but it did have the right to stop his working in its building. It further appeared by stipulation and findings of fact that he brought suit against the Y.M.C.A. for his injuries, which,

after his death was prosecuted to final judgment by the administratrix of his estate. That suit was defended by the New York Casualty Company under a non-waiver agreement which reserved to the New York Casualty Company the right to thereafter raise the question of its liability under the terms of its contract (Record, pp. 30-32). It further appears that compensation was paid to the said Arthur Andrews by the Works Progress Administration after his injury (Record, pp. 103-104).

The policy of the New York Casualty Company provided:

"The New York Casualty Company—

"DOES HEREBY AGREE with the Assued named and described as such in the Declarations forming a part hereof, respecting accidental bodily injuries, including death at any time resulting therefrom, as follows:

"I. TO INSURE the Assured against loss by reason of the liability imposed by law upon the Assured for damages on account of such injuries, and to pay and satisfy judgments finally establishing the Assured's liability in actions defended by the Company, all subject to the limits expressed in Paragraph 12 of the Declarations;

"V. THE FOREGOING AGREEMENTS SHALL APPLY only to such bodily injuries as are sustained or alleged to have been sustained during the policy period defined in said Declarations by any person or persons not employed by the Assured as the result of an accident occurring by reason of the existence, maintenance or use, of any elevator or elevating or lowering device, which is described in Declaration 4, its well, shaft or hoistway or the machinery, equipment or appliances used in connection therewith and appurtenant thereto.

"EXCLUSIONS:

"VI. This policy shall not cover:

"(c) bodily injuries or death caused by the construction, reconstruction, demolition or extraordinary repair of any elevator or hoisting device, or the building or structure within which it is contained; but privilege is granted under this policy to make such ordinary altera-

tions repairs as are necessary to the care of any elevator covered herein and its maintenance in good condition, including the renewal of existing mechanical equipment, provided that such elevator shall not be used for service while such work is being done;

"(d) the liability imposed or assumed by the Assured under any Workmen's Compensation Statute;

"(e) the liability of the Assured to employees which is based on the relationship of master and servant." (Record, p. 21.)

It was contended by the New York Casualty Company in the trial court that Andrews was employed by the Y.M.C.A. This was decided by the trial court adversely to the New York Casualty Company, and was decided by the Circuit Court of Appeals favorably to the New York Casualty Company. The latter court held that Andrews was a lent employee and as such was employed by and in the service of the Y.M.C.A. This portion of the opinion is as follows:

"At the time of this injury, Andrews was an employee as regards the relationship of master and servant, because he occupied that status known to the law as a loaned employee and because the doctrine of loaned employee is recognized in Iowa (citing cases)."

At the time of the injury to Andrews, the petitioner carried three policies of casualty insurance, one against public liability, one against workmen's compensation, and one against liability for injuries occurring from the existence or use of the elevator or elevator shaft (R. pages 41 to 51, inclusive). The Y.M.C.A. paid $10,000 in purchase or settlement of the judgment for the death of Andrews (R. pp. 105 to 109). Each company was a party to the record. All have escaped. The first on the ground that it did not insure against accidents occurring in the elevator or shaft, the second on the ground that Andrews was not an employee, and the third on the ground that Andrews was an employee.

IV.

SPECIFICATION OF ERRORS.

1. The United States Court of Appeals for the Eighth Circuit erred in holding that Andrews was an employee of the Y.M.C.A. at the time of his injury within the meaning of that term in the policy of respondent.

2. The Circuit Court of Appeals for the Eighth Circuit erred in holding that the status of master and servant existed between Andrews and the Y.M.C.A.

3. The Circuit Court of Appeals for the Eighth Circuit erred in holding that a loaned employee occupies the status of a servant or employee of the person to whom he is loaned, merely because that person exercises control over the manner of his work.

4. The Circuit Court of appeals for the Eighth Circuit erred in holding that because the doctrine of *respondeat superior* may apply to a loaned employee that this causes the status of master and servant to arise and exist.

V.

ARGUMENT.

The Specification of Errors in different language raises but one point, and that will be argued here, namely, was Andrews the employee of the Y.M.C.A. within the provisions of the policy of the respondent?

Brief.

Under the decisions of the Supreme Court of Iowa, Andrews was not an employee of the Y.M.C.A.

Oswalt v. *Lucas County*, 222 Iowa 1099, 1105, 1106, 270 N. W. 847.

Hoover v. *Independent School District*, 220 Iowa 1364, 264 N. W. 611.

Ford v. *Independent School District*, 223 Iowa 795, 273 N. W. 870.

Knudson v. *Jackson*, 191 Iowa 947, 183 N. W. 391.

The cases cited and relied upon in the opinion of the Circuit Court of Appeals merely hold that the rule of *respondeat superior* arises from the right to control, not the status of master and servant. These cases are:

Lembke v. *Fritz*, 223 Iowa 261, 272 N. W. 300.
Traynor v. *Keefe Construction Company*, 199 Iowa 575, 202 N. W. 218.
Ash v. *Century Lumber Company*, 153 Iowa 523, 133 N. W. 888.

A contract of hiring is always essential to create the status of employer and employee, both under the statutory and general law. A designation of a "loaned employee" as an employee of the one to whom he is loaned is a fiction sometimes used by courts in applying the doctrine of *respondeat superior*. This is a misnomer and has no application in an action for injury sustained by the loaned employee himself.

39 Corpus Juris, 33.
Knudson v. *Jackson*, 191 Iowa 947, 949, 183 N. W. 391.
Ash v. *Century Lumber Company*, 153 Iowa 523, 133 N. W. 888.
Norton v. *Day Coal Company*, 192 Iowa 160, 180 N. W. 905.
Traynor v. *Keefe Construction Company*, 199 Iowa 575, 202 N. W. 218.
Lembke v. *Fritz*, 223 Iowa 261, 272 N. W. 300.
Hoover v. *Independent School District*, 220 Iowa 1364, 264 N. W. 611.

The Y.M.C.A. had no right to select Andrews, nor to discharge him, nor to fix his rate of pay. He was, therefore, not its employee, although he worked in its building.

Norton v. *Day Coal Company*, 192 Iowa 160, 180 N. W. 905.
Hoover v. *Independent School District*, 220 Iowa 1364, 264 N. W. 611.
Pace v. *Appanoose County*, 184 Iowa 498, 168 N. W. 916, 922.
39 Corpus Juris, 1269.

The word "employee" in the insurance policy will be construed in its ordinary usual and popular meaning.

Tubbs v. *Mechanics Ins. Co.*, 131 Iowa 217, 108 N. W. 324.
Blank v. *National Surety Co.*, 181 Iowa 648, 165 N. W. 46.
Hiatt v. *Travelers' Ins. Co.*, 197 Iowa 153, 197 N. W. 3.

The language of the policy, if uncertain or capable of two meanings, will be construed against the insurer and favorably to the insured.

Ellis v. *Interstate Business Men's Acc. Assn.*, 183 Iowa 1279, 168 N. W. 212.
Miller v. *Mutual Ben. Life Ins. Co.*, 31 Iowa 216.
Simpkins v. *Hawkeye Com. Men's Assn.*, 148 Iowa 543, 126 N. W. 192.
Robinson v. *Hawkeye Com. Men's Assn.*, 186 Iowa 759, 171 N. W. 118.

Argument.

1. *Work on relief project or "made work" is not performed as an employee.*

The status of master and servant arises out of contract, express or implied. The Supreme Court of Iowa in *Woodard* v. *Herald Publishing House*, 181 Iowa 791, 165 N. W. 47, approved the following as a correct statement of the law:

> "This (the relation of master and servant) can only be created by contract, either express or implied," *l. c.* 796.

In *Knudson* v. *Jackson*, 191 Iowa 947, 193 N. W. 391, the Iowa Court quotes the following with approval:

> "Employment implies a contract on the part of the employer to hire and on the part of the employee to perform service." *Malloy* v. *Board of Education*, 102 Cal. 642, 36 Pac. 948.

Under the law, as declared by the legislature and announced by the Supreme Court of Iowa, the decedent, Arthur Andrews, was not an employee of the Y.M.C.A. when injured, for the reason he was doing work on a relief project. The case of *Oswalt* v. *Lucas County*, 222 Iowa 1099, 270 N. W. 847, was an appeal from the decision of the Iowa Industrial Commissioner allowing compensation to a claimant under the Iowa Workmen's Compensation Act. The District Court refused the compensation on the ground that Oswalt was not an employee, and the Supreme Court affirmed the judgment. The decision is based upon the proposition that the claimant must show that the legal relation between him and the county was at the time of the injury that of employer and employee, and that the facts did not establish such relationship. The court said at pages 1105 and 1106 of 222 Iowa:

> "But even if it be conceded that the facts would be sufficient to support a finding of the relation of employer and employee, if the matter of public relief was not involved, we think the greater weight of authority in this country is to the effect that persons on relief, who perform work on relief projects, or on what is sometimes called 'made work' do not perform such work as employees. English authorities, it is true, are to the contrary, and there are authorities in this country that follow the English rule. Among the cases adopting this view, appellant cites *Waycross* v. *Hayes*, 48 Ga. App. 317, 172 S. E. 756; *Forest Preserve District* v. *Industrial Commission*, 357 Ill. 389, 192 N. E. 342; *Industrial Commission* v. *McWhorter*, 129 Ohio St. 40, 193 N. E. 620, 96 A. L. R. 1150; *Benson* v. *Department of Labor and Industries*, 180 Wash. 655, 41 Pac. (2d) 404. * * *
>
> "The opposite view, that is, that the employment relief workers are not employees, has been adopted by the courts of California, Indiana, Michigan, Nevada, North Carolina, West Virginia and Wisconsin."

Here is a direct decision as to one who was performing relief work or "made work" such as Andrews was perform-

ing, by the Supreme Court of Iowa that he was not performing such work as an employee. On this subject of "made work", Mr. Dillon, the Secretary of the Y.M.C.A., testified as follows:

> "The W.P.A. had a large number of men that they assigned to recreational work, not particularly because they were skilled in recreational work, but because they had to get them to work." (Record, p. 120.)

The Supreme Court of Iowa has held that a C.W.A. worker, who was injured while decorating a school building, was not an employee of the school district, because he did not have a contract of employment.

> *Hoover* v. *Independent School District*, 220 Iowa 1364, 264 N. W. 611.

At page 35 of the abstract in the *Hoover* case, I. S. Jackson, the foreman, testified as follows:

> "I had general supervision of the work. I directed the workmen as to what rooms they would work in, and I had work going on in different rooms at the same time. I designated what men should work in a certain room, and what men should work in certain other rooms. I had direction of mixing of the paint. I had charge of the painting and seeing it was there and the amount to use. I had arranged with the school board to act as foreman on this particular job. I made no report to the United States Government of this accident."

In holding that the C.W.A. workers who are injured while thus engaged in decorating the school house are not employees of the school board or anyone's employees except the C.W.A., the Supreme Court said at pages 1366, 1367 and 1368 of the opinion:

> "The theory of the claimants is that while the Federal Government was the general employer of these men, the school district was their special employer; that these claimants came within the rule of the loaned employee. * * *

"This court, however, has adopted a test for determining whether the relation of employer and employee exists under our statute which would seem to quite effectively exclude the loaned employee as an employee of the person to whom he was loaned. Claimants practically concede that if the rule laid down in *Knudson* v. *Jackson*, 191 Iowa 947, 183 N. W. 391, 393, is to be adhered to, they cannot recover. We there said:

> 'In order for a person to come within the terms of this act (Workmen's Compensation) as an employee, therefore, it is essential that there be a "contract of service, express or implied," with the employer whom it is sought to charge with liability.'

"This rule is determinative of this appeal. The circumstances in this case are such that it cannot possibly be said that there was any contract of service, express or implied, between these workers and the school district. The workers were employed, told when and where to work, and paid for their services, by the Civil Works Administration. The contract of service which these workers had was entirely with the Civil Works Administration.

"We may add that if the rule for which appellants contend were recognized, the result could not be different in this case. Without reference to the details, it is sufficient to say that the particular project on which these men were working was carried on as a Civil Works project as distinguished from a school district project. That is, the work was being done by the Civil Works Administration. Whatever aid to the project was furnished by the school district was furnished by way of contribution to the Civil Works Administration. The purpose of the Civil Works Administration was to create employment. It was set up under the provisions of the National Industrial Recovery Act, 48 Stat. 195, for that purpose. It undertook these projects with the consent of the public body affected by the project as a means of furnishing employment. The fact that the property of the school district was benefited, and the further fact that representatives of the school district were present when the work was being done to see that the completed job conformed to its plan for the improvement, are not controlling. The purpose of the Civil Works Admin-

istration was being accomplished by carrying out these projects with workmen employed by it. The workmen, therefore, were actually working for the Civil Works Administration when their injuries were received, and the rule of the loaned employee, even if recognized by us, would not apply.

"Confirmation of this view is found in the fact that Congress, by special act, extended to all Civil Works Administration workers, while engaged in these projects, the benefits accruing to injured employees of the Federal Government. The claimants in this case are now receiving benefits from the Federal government as employees suffering injuries in the course of their employment by the Federal government."

Applying the foregoing to the record in the case at bar, it will be noted that the work being done on the gymnasium in the *Hoover* case was being done under what was designated as C.W.A. project No. 22, while the work Andrews was doing in the Y.M.C.A. building was being done under what was designated as W.P.A. Recreational Project No. 112. Andrews was paid benefits from the Federal government as an employee suffering injuries.

In the *Hoover* case, the workers were directed by the C.W.A. to work in the gymnasium of said school building, and they were paid by the United States Government. In the case at bar, the decedent, Andrews and eight other workers were directed by the W.P.A., through the Des Moines Playground and Recreational Commission, to work in the Y.M.C.A. building, and they were paid by the United States Government.

The case of *Ford* v. *Independent School District*, 223 Iowa 795, 273 N. W. 870, was brought to recover damages for the same injury for which it was sought to recover Workmen's Compensation in the *Hoover* case, *supra*. A demurrer was sustained to plaintiff's petition. In affirming the ruling on the demurrer at pages 872 and 873 of the opinion, the Iowa Supreme Court said:

"The relation that existed between plaintiff and defendant, at the time of plaintiff's injuries, has been determined by this court in an appeal from previous actions brought by plaintiffs Hoover and Ford to recover from defendants under the Iowa Workmen's Compensation Act.

"The opinion further holds that these plaintiffs were actually working for the Civil Works Administration when their injuries were received, and that the rule of the loaned employee, even if recognized by us, would not apply, and that confirmation of this view is found in the fact that these plaintiffs received the benefits accruing to employees of the Federal Government suffering injuries in course of their employment.

"The result is that the contention that there was an implied contract or warranty above mentioned *cannot be grounded upon any common law or statutory duty of an employer to an employee.*"

In speaking of the status of a loaned employee, the Iowa Supreme Court said:

"In a sense, Knudson was no more than an agent for Knight, directing Jackson as to the particular work he was to do; but there was no pretense of a contract, express or implied, between Jackson and Knudson." *Knudson* v. *Jackson, supra,* p. 956. Conformably, the holding was that the loaned employee (Jackson) was not the servant of the borrower (Knudson).

2. *Contract of hire is always essential.*

"Loaned employee" is a fiction or misnomer, never applied in action for injury to loaned employee himself.

A contract of hiring, either express or implied, is a necessary prerequisite to the relationship of master and servant.

In *Woodard* v. *Herald Publishing House,* 181 Iowa 791, at 796, the Iowa Supreme Court approved the doctrine that relation of master and servant can only be created by contract, either express or implied.

In *Knudson* v. *Jackson*, 191 Iowa 947, 183 N. W. 391, the Supreme Court of Iowa quotes with approval the general or common law definition of "employee" appearing in *Malloy* v. *Board of Education*, 102 Cal. 642, 36 Pac. 948, as follows:

> "Employment implies a contract on the part of the employer to hire and on the part of the employee to perform service."

This is the very basis of the relationship and is announced in all the jurisdictions. *Benway* v. *Missouri-Kansas-Texas Railroad Company*, 26 Fed. (2d) 383; *Koski* v. *Industrial Commission*, 233 Wis. 1, 288 N. W. 240, 241; *Copp* v. *Paradis*, 130 Me. 464, 157 Atl. 228, 229; *McDowell* v. *Duer*, 78 Ind. App. 441, 33 N. E. 839, 840.

The following cases were relied upon by counsel for respondent below and are cited in the opinion of the Circuit Court of Appeals as sustaining the doctrine that Andrews was an employee as regards the relationship of master and servant at the time of this injury, to-wit: *Lembke* v. *Fritz*, 223 Iowa 261, 272 N. W. 300; *Traynor* v. *Keefe Construction Company*, 199 Iowa 575, 202 N. W. 218; *Norton* v. *Day Coal Company*, 192 Iowa 160, 180 N. W. 905; *Ash* v. *Century Lumber Company*, 153 Iowa 523, 133 N. W. 888; 38 L. R. A. (N. S.) 973. Of these cases in their order:

Lembke v. *Fritz*, was a case brought to collect damages against Fritz, the master under the doctrine of *respondeat superior* and holds that one soliciting for and selling gasoline with his own truck under the circumstances there revealed was a servant of the master.

Traynor v. *Keefe* was an action for damages to recover for the wrong of an alleged servant. It holds the servant in the act complained of was not acting for the defendant, Keefe Construction Company, but was acting for the electric wiring contractor on the job. It holds that the person who controls or directs the wrongful act complained of is liable therefor.

Norton v. *Day Coal Company* was a case brought to recover Workmen's Compensation on an appeal from a finding of the Industrial Commissioner denying compensation. There, the plaintiff was a teamster. He owned his own team, he delivered coal for defendant at so much per ton. It was held he was not an employee. The court said on the bottom of page 164 and the top of page 165, of 192 Iowa, page 907 of 180 N. W.:

> "Norton is not an employee within the Act, because there was no right to discharge him and the right to discharge for misconduct or disobedience is an essential test (citing cases). There was no right to discharge because, as said, claimant had virtually the status of a drayman. Plaintiff could not tell when he came whether he would get any work. He was not obliged to accept any that was offered, he was at all times at liberty to haul for others, rather than defendant. The most that could be done was to refrain from giving him coal to deliver. The only power that defendant had was to elect whether he should be given work and how long it should continue. There was the right to interrupt or terminate the contract but not to discharge."

Ash v. *Century Lumber Company* was an action by a third party to collect damages from the Century Lumber Company for the negligence of Ash on the doctrine of *respondeat superior*. Ash drove a team for a Mrs. Wright. She hired the team and driver to the Century Lumber Company. Held, that when Ash was negligent in driving the team, the Century Lumber Company was not liable, because it did not control and direct the manner of the driving.

These cases are a far cry from supporting the doctrine that a loaned employee is the servant or employee of the borrower within the language of the policy in the case at bar.

One to whom the servant of another is temporarily lent or hired is not the employer of such servant. The cases above only hold that in actions for damages brought by an-

other to recover for negligence of such servant while he is thus temporarily loaned or hired, the responsibilities of the one to whom he is loaned are the same as though he were the master insofar as, and only insofar as, he may exercise the authority of a master. In other words, the doctrine of *respondeat superior* arises. As the Court said in the *Ash* case, "The only theory on which defendant could be held liable would be that in handling the team the driver was acting for the defendant."

There are no cases cited either by counsel in the brief below nor relied upon by the court in the opinion, holding that the status of master and servant arises between a master and a loaned employee in the general sense of the term as used in the policy of insurance in the case at bar. In *Ash* v. *Century Lumber Company,* the action was by a third party. That is also true in *Lembke* v. *Fritz* and in *Traynor* v. *Keefe.* In not one of these cases is the loaned employee doctrine recognized or applied where the action is to impose liability for an injury sustained by the loaned employee himself, and these authorities clearly show that such loaned employee doctrine has no application to such an action, even though the court would have recognized it as applying to the doctrine of *respondeat superior* in imposing liability for injuries to others, as a result of the negligence of the so-called loaned employee while acting for and under the direction and control of the one to whom he was loaned.

The right to hire and discharge, the right to select and the right to demand and receive pay are essential to create the relation of employer and employee under the decisions of the Iowa Supreme Court.

The making of a contract which includes the offer and acceptance of work the right to discharge, and the right to receive pay are all absent in this case. They are essential to the status of master and servant.

3. *Petitioner is entitled to usual and ordinary meaning of word "employee".*

This case deals with an insurance policy and the words of the policy are to be interpreted according to their usual and ordinary meaning in the community. *Tubbs* v. *Mechanics Ins. Co.*, 131 Iowa 217, 108 N. W. 324; *Blank* v. *National Surety Co.*, 181 Iowa 648, 165 N. W. 46; *Hiatt* v. *Travelers' Ins. Co.*, 197 Iowa 153, 197 N. W. 3.

This does not make room for the technical construction of "employee" arising from the doctrine of a loaned servant. The ordinary person would term Andrews a W.P.A. worker. It would never occur to him that he was an employee of the Y.M.C.A. Andrews was employed by the P.W.A. while working at the Y.M.C.A.

In this case the petitioner carried another policy insuring against payment of compensation to employees on account of injuries (Record, pp. 43-51). In order not to duplicate coverage, employees were excepted from respondent's policy. The classification of "employee" must be such as is recognized under the Iowa Workmen's Compensation Act. Otherwise, the purpose of the policy is avoided. When this employee of the Works Progress Administration is given the status of an employee of the Y.M.C.A., he is neither under the coverage of its compensation policy nor under that of its elevator policy. The employees intended to be excepted from the respondent's policy were those who were covered by the employee's Compensation policy, and under all of the cases above cited, Andrews did not come under the Compensation policy.

When it is considered, that the words of this contract of insurance are construed most strictly against the insurer and as liberally as the language will reasonably permit in favor of the insured, the error of the opinion becomes the more glaringly aparent.

With three policies of insurance, one against public liability, one against Workmen's Compensation and one against liability to others than workmen in or about the elevator, this petitioner has been denied protection. The public liability insurer has escaped because Andrews was working on the repair of the elevator doors, the Workmen's Compensation insurer has escaped because Andrews was not an employee and the elevator insurer because he was an employee.

The status of Andrews is of concern to the many W.P.A. workers throughout the nation. It is of great public interest. A wrong rule has been announced. It should be corrected.

We respectfully submit that the writ should be granted to that end.

VINCENT STARZINGER,
ROBT. J. BANNISTER,
THOS. M. BANNISTER,
Attorneys for Petitioner.

STIPP, PERRY, BANNISTER & STARZINGER,
Of Counsel.

No 269

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

YOUNG MEN'S CHRISTIAN ASSOCIATION,
Petitioner and Appellee Below,

vs.

NEW YORK CASUALTY COMPANY,
Respondent and Appellant Below.
EMPLOYERS MUTUAL CASUALTY COMPANY,
Respondent and Appellee Below.
CENTRAL SURETY AND INSURANCE CORPORATION,
Appellee Below.

RESISTANCE OF RESPONDENT EMPLOYERS MUTUAL CASUALTY COMPANY TO THE PETITION OF THE YOUNG MEN'S CHRISTIAN ASSOCIATION FOR WRIT OF CERTIORARI.

JESSE A. MILLER,
FRED C. HUEBNER,
ALEX M. MILLER,
CHARLES W. JOINER,
Counsel for Respondent, Employers Mutual Casualty Company.

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RESISTANCE OF RESPONDENT EMPLOYERS MUTUAL CASUALTY COMPANY TO THE PETITION OF THE YOUNG MEN'S CHRISTIAN ASSOCIATION FOR WRIT OF CERTIORARI.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your respondent, the Employers Mutual Casualty Company, having been made a party defendant in the district court, having been a party to the appeal to the Circuit Court of Appeals, having been served with the petition for writ of certiorari to this Court, and being weary of the seeming endlessness of this litigation, respectfully submits this argument in opposition to the allowance of a writ:

I.

Questions Presented.

The Association, as petitioner, presents two reasons relied on for allowance of the writ:

1. *Purported Conflict with Local Law.* That the decision of the Circuit Court of Appeals affects the substantive law as to the status of a W. P. A. worker and is claimed to be of an important question of local law in conflict with applicable local decisions.

2. *Purported Matter of National Interest.* That the decision of the Circuit Court of Appeals in its claimed effect on the substantive law as to the status of a W. P. A. worker is of an important question to the business world and the hundreds of thousands of employees so engaged.

II.

Reasons for Refusal.

Your respondent, the Employers, urges that the writ of certiorari be denied because:

1. *Status of W. P. A. Worker an Immaterial Issue.* Since the public liability policy issued by this respondent, the Employers, expressly excluded liability for injury and death *caused* by the *use* of any *elevator;* and since the record is without dispute that the *use* of the *elevator caused* the death of Andrews, his status as a W. P. A. worker was an immaterial issue.

2. *Reasons not Supported by Record.* Since no W. P. A. worker, nor his representative, is a party to this present cause; since the decision of the Circuit Court of Appeals does not affect the substantive law determining the rights of a W. P. A. worker; and since said decision is not *stare decisis* as to the status of a W. P. A. worker; the reasons relied on by the Association, as petitioner, for the allowance of the writ find no support in this present record.

3. *No Question for Review by This Court.* The present inquiry involves merely the private interests of two of the litigants:

> The petitioner and appellee below, a tort-feasor, who has satisfied the widow of the victim of the tort for the injuries and death inflicted, and
>
> The respondent and appellant below, an insurance company, who, petitioner urges, should indemnify petitioner for the amount paid the widow,

and said inquiry presents merely a question of construction of a private contract, which question is not of such gravity and importance as to require review by the Supreme Court of the United States.

III.

Opinions of Courts Below.

Tort Action in State Court. The opinion of the supreme court of Iowa pronouncing the substantive law applicable to the rights of the petitioner and the widow of the W. P. A. worker is officially reported in *Andrews v. Young Men's Christian Association of Des Moines,* 226 Iowa 374, 284 N. W. 186 (1939) (R. 95-96, 200); and is not before this Court for review.

Declaratory Judgment Action in Federal Court. The opinion of the Circuit Court of Appeals for the Eighth Circuit, dismissing the appeal of the Association from the declaratory judgment of the district court, and declaring no liability on the New York company policy, is officially reported in *New York Casualty Company v. Young Men's Christian Association, et al.,* 119 F. (2d) 387 (1941) (R. 200-206).

IV.

Statement of Case.

This respondent, the Employers, is impressed with the inaccurate impression created by petitioner's statement of the case. The first paragraph refers to the death of Andrews, and the second paragraph commences, "The case was tried to the court without a jury." This leaves the impression that the tort action was tried to a court without a jury, and that the decision in the tort action is before this court for review. To correct this inaccurate impression, this respondent submits a highly condensed summary of the highlights of this case in chronological order.

Injury to W. P. A. Worker. Arthur Andrews, a W. P. A. worker (R. 100, Stipulation, paragraph 34), while repairing a bracket on the basement door of the passenger elevator shaft in the Association's building on December 31, 1935, sustained injuries when the elevator descended down upon him, from which injuries he died on February 26, 1937. (R. 102, Stipulation, paragraph 38).

Workmen's Compensation Paid. During his lifetime, Arthur Andrews, and after his death his dependent surviving widow, Amelia Andrews, received workmen's compensation from the federal government on account of said injuries and death as a W. P. A. employee. (R. 100, Stipulation, paragraph 31).

Tort Action in State District Court. On December 23, 1936, Arthur Andrews commenced a tort action in the district court of Iowa against the Association for the personal injuries received (R. 94, Stipulation, paragraph 6), and, on March 27, 1937, Amelia Andrews, administratrix of the estate of Arthur Andrews, deceased, was substituted as party plaintiff and continued the action for the personal injuries and wrongful death. (R. 95, Stipulation, paragraph 6 (D) to (O)).

Insurance Carried by Association. At the time of the injury to Andrews the Association had three liability policies: An elevator liability policy of the New York company (R. 96, Stipulation, paragraph 7), a public liability policy of the Employers (R. 96, Stipulation, paragraph 9), and a workmen's compensation liability policy of the Central. (R. 96, Stipulation, paragraph 8).

Trial of Tort Action in State Court. The tort action prosecuted by the widow of Andrews against the Association was called for trial (R. 95, Stipulation, paragraph 6 (G)), and was defended by the New York company under a non-waiver agreement (R. 95, Stipulation, paragraph 6 (G) (H), Exhibit "G", R. 30-32); the jury returned a verdict against the Association for $21,886.50 (R. 95, Stipulation, paragraph 6 (J)); the judgment was reduced by remittitur to $15,000 (R. 95, Stipulation, paragraph 6 (K)); and an appeal was taken to the supreme court of Iowa pursuant to a supplemental non-waiver agreement (R. 95, Stipulation, paragraph 6 (L), Exhibit "H", R. 32-34).

Final Determination in the State Supreme Court. The judgment against the Association in favor of the widow of Arthur Andrews was affirmed by the supreme court of Iowa, *Andrews v. Young Men's Christian Association of Des Moines,* 226 Iowa 374, 284 N. W. 186 (1939). (R. 95-96, Stipulation, paragraph 6 (M)).

Declaratory Judgment Action in Federal District Court. After the affirmance of the judgment by the state supreme court, the New York company filed a complaint in the District Court of the United States for declaratory judgment that neither the Association nor the widow of Andrews was entitled to recover from the New York company under the terms of its elevator liability policy any sum on account of the judgment in favor of the widow and against the Association or on account of any loss sustained by the As-

sociation as a result of the injuries and death of Andrews. (R. 2-5).

Cross-Complaint of Association. To the complaint of the New York company the Association filed answer and cross-complaint, bringing in as added defendants the Employers and the Central, and praying that the court determine the liabilities of the several parties under and by virtue of the terms of their several policies. (R. 5-18).

Satisfaction of Judgment in State Court. Before trial in the Federal District Court, the Association, through a friendly Mr. Emerett C. Hansen, not a party to the action, satisfied the judgment entered in the state court in favor of the widow of Arthur Andrews. (R. 95-98, Stipulation, paragraphs 13-19).

Motions for Judgment. Upon the trial before the Federal District Court, without a jury, the Association made no motion for judgment, but the remaining parties did:

> The New York company on the ground that Andrews was *an employee* in the contemplation of its policy. (R. 159).
>
> The Employers on the ground that the injuries to Andrews were caused by the *use* of the *elevator* and its policy *did not cover* injuries caused by the *use* of any *elevator*. (R. 159-160).
>
> The Central on ten grounds, one being that the *tort action* in the state court was *not tried* on the *theory* of collecting *workmen's compensation* covered by its policy. (R. 160-164).

Judgment of Federal District Court. On January 17, 1940, the Federal District Court entered judgment in favor of the Association and against the New York company and dismissed with prejudice against the Association the cross-complaint as to the added defendants, the Employers and the Central, and entered judgment in favor of each of said added defendants. (R. 171-172).

Appeals to Circuit Court of Appeals. The New York company appealed from the judgment in favor of the Association and against the New York company (R. 173-178), the same being appeal No. 11,739 (R. 200), and the Association appealed from the judgment in favor of the Employers and the Central (R. 179-186), the same being appeal No. 11,740. (R. 200).

Motion to Dismiss Appeal of Association. The Employers and the Central filed motion to dismiss appeal No. 11,740, taken by the Association from the judgment in favor of the Employers and the Central (R. 204-205), which motion has been eliminated by the Association from the record before this court. (R. 207).

Decision of the Circuit Court of Appeals. On April 17, 1941, the Circuit Court of Appeals filed its opinion and judgment reversing the judgment of the district court in appeal No. 11,739, taken by the New York company, sustaining the motion to dismiss the appeal of the Association, and affirming the judgment in favor of the Employers and the Central in appeal No. 11,740. (R. 198-207).

Petition for Writ of Certiorari. The Association now petitions this court for a writ of certiorari to review the decision of the Circuit Court of Appeals in appeal No. 11,739, but does not ask this court to review the decision and judgment of the Circuit Court of Appeals in appeal No. 11,740. (Petition for Writ, page 3).

V.

Brief.

1. The Supreme Court's consideration of this case is limited to the questions presented by the petition for writ of certiorari.

Hellis v. Ward, 308 U. S. 365, 84 L. Ed. 327, 60 S. Ct. 283 (1939).

Washington-Virginia & Maryland Coach Co. v. National Labor Relations Board, 301 U. S. 142, 81 L. Ed. 965, 57 S. Ct. 648 (1937).

Prudence Company v. Fidelity & Deposit Co., 297 U. S. 198, 80 L. Ed. 581, 56 S. Ct. 387 (1936).

2. The inquiry as to whether the Circuit Court of Appeals properly construed the exclusion clause of the elevator liability policy in this case, where the tort-feasor primarily liable has satisfied the judgment for personal injuries and wrongful death and seeks indemnity from the company issuing the elevator policy, does not fall within the category of questions of such gravity and general importance as to require review by the Supreme Court.

Forsyth v. Hammond, 166 U. S. 506, 41 L. Ed. 1095, 17 S. Ct. 665 (1896).

In the Matter of John Woods and Stephen B. Lovejoy, 143 U. S. 202, 36 L. Ed. 125, 12 S. Ct. 417 (1892).

VI.

Argument.

1. *Status of W. P. A. Worker an Immaterial Issue.*

The petitioner has not accurately described the determination of the issues involving this respondent, the Employers. On page 7 of the petition for writ, petitioner states that the Employers escaped liability on the ground that it did not insure against accident occurring in the elevator or shaft, and, on page 20 of the petition for writ, petitioner states that the Employers escaped because Andrews was working on the repair of the elevator doors. We desire to correct this statement.

The owners', landlords', and tenants' public liability policy issued by the Employers specifically provides that the

policy does not cover loss arising from injury or death caused by reason of the use of any elevator (R. 43). In the motion for judgment at the close of the evidence the Employers urged that the undisputed evidence establishes that the injury sustained by Arthur Andrews were caused by the use of the elevator, that the policy issued by the Employers, by its clear and unambiguous terms, did not cover loss arising from injury by the use of any elevator and that the Association failed to establish any liability in the Employers under its policy for loss arising from injury and death of Arthur Andrews (R. 159-160). The district court, in the memorandum opinion, findings of fact and conclusions of law (R. 161-171), found: that the policy issued by the Employers clearly states that the policy does not cover injury or death caused by reason of the use of the elevator (R. 168); that the evidence disclosed that the accident was caused by and through the movement of the elevator and the negligence of the operator thereof; and giving the Association the benefit of all doubts the contract agreement was open to no other reasonable interpretation (R. 170); therefore, the payment of the judgment in favor of the widow of Andrews is not within the coverage of the Employers (R. 171).

We, therefore, submit that since the public liability policy issued by the Employers expressly excludes liability for injury and death caused by the use of any elevator, and since the record is without dispute that the use of the elevator caused the death of Andrews, the status of Andrews as a W. P. A. worker was an immaterial issue.

2. *Case limited to questions presented by petition for writ of certiorari.*

Citation of authority probably is unnecessary to support the contention that this court's consideration of this cause is limited to the questions presented by the petition for

the writ of certiorari. These late decisions of this court support this contention, *Hellis v. Ward*, 308 U. S. 365, 84 L. Ed. 327, 60 S. Ct. 283 (1939), *Washington-Virginia & Maryland Coach Co. v. National Labor Relations Board*, 301 U. S. 142, 81 L. Ed. 965, 57 S. Ct. 648 (1937), and *Prudence Company v. Fidelity & Deposit Co.*, 297 U. S. 198, 80 L. Ed. 581, 56 S. Ct. 387 (1936).

Although, upon the trial of this cause in the District Court of the United States, there were originally five parties to the action: the widow of Andrews, the Association, and the three insurance companies, the New York company, the Employers and the Central, during the process of the litigation, three of the parties have fallen by the wayside, to wit: the widow of Andrews and the two insurance companies, the Employers and the Central. At present, this cause involves the interests of only two parties: the Association and the New York company.

During his lifetime Andrews, and after his death his widow, received workmen's compensation from the federal government on account of the injury and death of Andrews as a W. P. A. worker. (R. 100, Stipulation, paragraph 31). No one complains about this. Therefore the question as to whether or not a W. P. A. worker is entitled to workmen's compensation from the federal government is not before this court for review.

During his lifetime Andrews commenced a tort action against the Association in the state court (R. 91, Stipulation, paragraph 6), which action, after his death, was prosecuted by his widow to a successful conclusion. (R. 95, Stipulation, paragraph 6 (D) to (O)). The judgment obtained in the state court against the Association has been satisfied by the Association. (R. 97-98, Stipulation, paragraphs 13-19). No one complains about this. Therefore the question as to whether or not a W. P. A. worker may maintain an action at law against the wrongdoer for dam-

ages in addition to the workmen's compensation received from the federal government is not before this court for review.

The Federal District Court entered judgment in favor of the Employers (R. 171-172), which judgment was affirmed by the Circuit Court of Appeals (R. 198-207). The Association does not ask this court to review the judgment in favor of the Employers. (Petition for Writ, page 3). Therefore the question as to whether or not the Employers is liable under the terms of its public liability policy is not before this court for review.

The Federal District Court entered judgment in favor of the Central (R. 171-172), which judgment was affirmed by the Circuit Court of Appeals (R. 198-207). The Association does not ask this court to review the judgment in favor of the Central. (Petition for Writ, page 3). Therefore the question as to whether or not the Central is liable under the terms of its workmen's compensation policy is not before this court for review.

The sole question presented to this court involves the decision of the Circuit Court of Appeals in appeal No. 11,739 in which the Circuit Court of Appeals held the New York company is not liable to the Association. (Petition for Writ, page 3). The pertinent parts of the decision of the Circuit Court of Appeals read as follows:

> "The New York company advances several claims why this accident was not within the provisions of the policy. It is necessary to examine but one of these. That contention is that the policy excluded injuries to employes and that Andrews was, at the time of injury, an employe of the Association within the meaning of the policy. This position is well taken. Not only does this policy, in the liability clause, expressly confine liability to 'any person or persons not employed by the Assured' but the provision covering exclusions expressly excludes liability under any workmen's compensation statute and 'the liability of the Assured to employes

> which is based on the relationship of master and servant.' The last quoted expression makes it very clear that the policy intended to exclude from liability an injury to anyone who might be regarded as an employe under the relationship of master and servant. * * *
>
> "* * * We think the court should have declared no liability on the New York company policy. This disposes of and results in reversal as to appeal No. 11,739." (R. 202-204).

It will be noted that the decision of the Circuit Court of Appeals in this case does not involve the substantive law applicable to the rights of W. P. A. workers, but merely involves the construction of a single insurance policy and the interpretation of the actual words used in this one instrument. Other collateral matters might have an academic interest, but they are not matters which are before this court for review.

3. *No question for review by this court.*

It is not open to debate that a review on writ of certiorari is not a matter of right, but of sound discretion, and will be granted only where there are special and important reasons therefor. This principle was announced by this court in the much cited case *Forsyth v. Hammond,* 166 U. S. 506, 41 L. Ed. 1095, 17 S. Ct. 665 (1896), where Justice Brewer announced the power to grant a writ "will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise." This principle has been incorporated in the present rules of this court. (Rule 38, paragraph 5).

Petitioner in this cause has recognized the above stated principle, and petitioner has painstakingly striven to couch

the "reasons relied on for the allowance of the writ" in language which coincides with the principle announced and the rules adopted by this court. We submit that, when the record is scrutinized, the reasons relied on are but empty words.

We have pointed out above that the widow of the W. P. A. worker, Andrews, is no longer a party to this cause; the widow has been paid workmen's compensation by the federal government (R. 100, Stipulation, paragraph 31); the widow has recovered from the wrongdoer in a tort action in the state court (R. 95, Stipulation, paragraph 6 (D) to (O)); and petitioner has satisfied that judgment (R. 97-98, Stipulation, paragraphs 13-19). Clearly the decision of the Circuit Court of Appeals does not affect the substantive law applicable to the rights of a W. P. A. worker.

The decision of the Circuit Court of Appeals can be *stare decisis* only in a case involving the construction of a contract of insurance containing provisions identical to the policy of the New York company where a policy holder has satisfied the victim of an accident for the damages arising from a tort. The decision has no application to the status of W. P. A. workers generally.

We submit that the petitioner in searching for some special and important reasons for allowing the writ of certiorari in the cause at bar has hit the nail squarely on the thumb.

Disregarding the inadequacy of the record to support the reasons relied on by petitioner for the allowance of the writ, and taking an accurate view of the record, we submit that the inquiry as to whether the Circuit Court of Appeals properly construed the exclusion clause of the elevator liability policy of the New York company in this case does not fall within the category of questions of such gravity and importance as to require review by the Supreme Court of

the United States. In support of this position we submit the following decision of this court.

In the Matter of John Woods and Stephen B. Lovejoy, 143 U. S. 202, 36 L. Ed. 125, 12 S. Ct. 417 (1892), the workman, August Lindvall, first brought a tort action against Woods and Lovejoy for damages for personal injury caused by the alleged negligence of Woods and Lovejoy in the district court of the state of Minnesota. The trial of that case terminated in a directed verdict, which judgment was affirmed by the supreme court of Minnesota. Lindvall then brought an action in the Federal Circuit Court. Upon the first trial of that case, the Federal Court directed a verdict on the ground of former adjudication, but a new trial was granted. Upon the second trial, a verdict was returned for the plaintiff Lindvall, which judgment was affirmed by the Circuit Court of Appeals for the eighth circuit. Woods and Lovejoy applied to this court for a writ of certiorari. In denying the writ Chief Justice Fuller said, in part:

> "But we do not regard the inquiry as to whether it was settled law in the State of Minnesota that a judgment of dismissal in a former suit, such as pleaded here, was not a bar to a second suit upon the same cause of action, or whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial of this case, as falling within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them."

In the above cited case, this court held that the inquiry as to whether the law of Minnesota regarding a plea of former adjudication was properly applied, and the inquiry as to whether the law in respect to recovery by a servant against his master for injuries received in the course of employment was properly applied, were not questions of such gravity and general importance as to require a review by

this court. It will be noted that, in the cited case, the substantive law applicable to the rights of the workman was involved, but this court held that the question was not of such gravity and general importance as to require review. In the cause at bar, the substantive law applicable to the rights of W. P. A. workers is not involved. The questions, whether or not Andrews, as a W. P. A. worker, might recover workmen's compensation from the federal government and recover in a tort action in the state court, are not before this court for review. The question here presented is merely the inquiry as to whether the Association, having satisfied the widow of Andrews for the wrongful death caused by the negligence of the Association, may be indemnified by the New York company under the terms of its specific elevator liability policy. We submit that, under the rule announced in the above cited case, the inquiry presented in the cause at bar does not fall within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals by the Supreme Court of the United States.

VII.

Conclusion.

The unfortunate accident in this case occurred in the year 1935.

Petitioner desires to extend this litigation on the ground that the decision of the Circuit Court of Appeals involves the law applicable to W. P. A. workers generally. An analysis of the record demonstrates that the law applicable to the status of W. P. A. workers generally is not before this court for review.

The question, as to the rights of the W. P. A. worker and petitioner, has been submitted to the courts of the state of Iowa for determination and has been decided by the court

of last resort in that state. Petitioner has acquiesced in this determination and satisfied the judgment in the state court.

Petitioner has invoked the jurisdiction of the federal courts to determine the question as to the rights of the petitioner and the New York company under the terms of the contract entered into by these two parties. The question, as to the rights of the petitioner and the New York company, has been determined by the Circuit Court of Appeals, the tribunal created for the purpose of terminating general litigation which is of interest to the parties to the litigation only.

On the record before this court, petitioner presents no ground for the continuation of this litigation by the granting of a writ of certiorari.

The litigation should now terminate.

Respectfully submitted,

JESSE A. MILLER,
FRED C. HUEBNER,
ALEX M. MILLER,
CHARLES W. JOINER,
Counsel for Respondent, Employers Mutual Casualty Company.

No. 269

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

YOUNG MEN'S CHRISTIAN ASSOCIATION,
A CORPORATION,
Petitioner and Appellee Below,

vs.

NEW YORK CASUALTY COMPANY,
A CORPORATION,
Respondent and Appellant Below.

RESISTANCE OF NEW YORK CASUALTY COMPANY, RESPONDENT, (APPELLANT BELOW) TO PETITION FOR WRIT OF CERTIORARI OF YOUNG MEN'S CHRISTIAN ASSOCIATION, PETITIONER, (APPELLEE BELOW).

DONALD EVANS,
WM. F. RILEY,
EHLERS ENGLISH,
Attorneys for Respondent.

CARR, COX, EVANS & RILEY,
Of Counsel.

VINCENT STARZINGER,
ROBERT J. BANNISTER,
THOMAS M. BANNISTER,
Attorneys for Petitioner.

STIPP, PERRY, BANNISTER & STARZINGER,
Of Counsel.

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Respondent respectfully shows:

That for a proper consideration of the grounds urged for a review by this Court of the judgment referred to in the Petition for Writ of Certiorari it is necessary to have in mind a few more of the facts than have been set out therein.

STATEMENT.

This suit was brought by Respondent against the Petitioner for a declaratory judgment to adjudicate whether or not Respondent was liable to indemnify Petitioner by virtue of the terms of an elevator liability insurance policy, on account of a judgment rendered against the Petitioner awarding damages for the death of one Arthur Andrews. Respondent has paid the judgment by taking an assignment thereof. (Rec. pp. 105-109.)

The facts stipulated and found by the trial Court disclose that Respondent issued to the Petitioner a policy insuring it against loss by reason of liability imposed by law upon the assured for damages on account of injuries to persons "not employed by the assured" as the result of an accident occurring by reason of the existence, maintenance or use of an elevator. That policy further provided that it should not cover:

> "(d) the liability imposed or assumed by the assured under any Workman's Compensation Statute;
> (e) the liability of the assured to employees which is based on the relationship of master and servant."
> (Rec. p. 21; Petition for Writ of Certiorari, pp. 2-3.)

According to paragraph (35) of the Stipulation of Facts (Rec. pp. 100-101), and which the Court incorporated in his findings of Fact, (Rec. p. 170), Andrews was a Works Progress Administration worker, who was assigned to the Petitioner in accordance with an agreement between Dillon, the secretary of the Petitioner, and Kathryn Krieg, Works Progress Administration supervisor of Recreational Project No. 112, to do such work in the building of the Petitioner *as might be designated by the Petitioner.* The arrangement was made some time in November 1935 and Andrews continued until December 31st, when he received fatal injuries while repairing a bracket inside the door of

the elevator shaft in the basement story. The stipulation discloses that Andrews was to do work *as directed by Petitioner* under the direction and supervision of Ralph W. Anderson, its building superintendent; that his wages were paid not by the Petitioner, but by the Works Progress Administration; that the Petitioner had no right to discharge him from the rolls of the Works Progress Administration, but did have the right to refuse him to work in its building.

It further appears from the Statement and Findings that during all the time Andrews worked in the building the labor and work to be done by him was *chosen by and done in the manner directed by said superintendent, Anderson.*

Suit was brought in the District Court of Polk County, Iowa, which was prosecuted to final judgment by his administratrix. Judgment for damages was affirmed by the Supreme Court of Iowa, the opinion being reported in 284 Northwestern Reporter, 186, 226 Iowa, 371.

In that suit there was no adjudication of his status. The principal contention upon appeal was that the Petitioner, as a charitable organization, was immune from liability for his injuries. This was overruled by the Supreme Court of Iowa and the opinion contains the following language:

> "Under our conception of the law and the facts in this case, and under the many authorities upholding the contention of the appellee, it is not necessary that we determine whether the deceased was a stranger to the appellant, or its invitee or its *employe*, because in any of these relations it would be liable to him for its negligence. The jury has found that it was negligent and we find that the evidence supports such finding." (Italics ours.)

The contention in this suit was that Andrews was an employe of the Petitioner and consequently outside of the class of persons, liability for injuries to whom was assumed by the Respondent under its contract. That contention was

based upon the proposition that while Andrews was in the general employ, or at least upon the rolls, of the Works Progress Administration, he became an employe of the Petitioner as a result of the arrangement by which he was assigned to Petitioner's building to do work as designated *by it.* He was not employed upon work which the Works Progress Administration had agreed to do. He was under the full control and direction of Petitioner's building superintendent. (Stipulation, Rec. pp. 100-101.)

After the commencement of this suit Petitioner, by motion, secured an order to add the Employers Mutual Casualty Company and the Central Surety and Insurance Corporation as parties-defendant, and filed cross-petitions against each of them.

The Employers Company had issued to Petitioner what is generally known as a "Public Liability Policy", which undertook to indemnify it against loss for liability imposed by law for injuries to persons not employed and which policy also undertook to exclude from its coverage liability on account of injuries sustained in connection with the use or maintenance of an elevator.

The Central Surety and Insurance Corporation had issued to Petitioner what is denominated as a "Standard Workmen's Compensation and Employers' Liability Policy", by the terms of which it agreed:

> "* * * as respects personal injuries sustained by employees, including death at any time resulting therefrom, as follows:
>
> One. (a) To Pay Promptly to any person entitled thereto, under the Workmen's Compensation Law * * *, * * *
>
> One. (b) To indemnify this Employer against loss by reason of the liability imposed upon him by law for damages on account of such injuries to such of said employees as are legally employed, * * *."
>
> (Rec. p. 35.)

The trial Court held: (Rec. pp. 167-168-169.)

(1) That the Supreme Court of Iowa recognizes the "loaned servant" rule.

(2) That by reason of the decision of the said Court in the case of *Hoover v. Independent School District*, 220 Iowa, 1361, 264 Northwestern Reporter, 611, the Respondent was liable.

(3) That the Central Company was not liable because it covered employes only.

(4) That inasmuch as Andrews' injury was caused by the operation of an elevator, it was excluded from the field of liability assumed by the Employers Company.

The Respondent prosecuted an appeal to the Circuit Court of Appeals for the Eighth Circuit, assigning as the principal ground of the appeal that Andrews was an employe of the Petitioner at the time he received the injury which caused his death; basing such claim upon the law of Iowa that while he may have been in the general employ of the Works Progress Administration, he became an employe of Petitioner under the arrangement pursuant to which Petitioner had complete supervision over him, both with respect to the work to be done and the manner of its performance. (See Statement of Points, Rec. pp. 175-176.)

Petitioner took a cross-appeal from that part of the judgment which denied recovery against the Employers and the Central Companies.

The Circuit Court of Appeals sustained the claim of Respondent; but on account of the failure of Petitioner to comply with its Rules 21 (1) and 11 (2, Fourth) and (4) refused to consider the Petitioner's appeal upon its merits.

In the Petition for Writ of Certiorari Petitioner makes no claim that the Circuit Court of Appeals erred in affirming that part of the judgment from which Petitioner ap-

pealed on the ground disclosed in the opinion. (119 Federal Reporter (2) 387; Rec. p. 200, at 204-205.)

BRIEF.

I.

Certiorari will not be granted except in a case involving a principle, the settlement of which is of importance to the public, as distinguished from that of the parties; nor for the purpose of giving the parties another hearing.

Layne and B. Corp. v. Western Well Works, 261 U. S. 387.

Magnum Import Co. v. Caty, 262 U. S. 159.

This case does not involve a question of importance to the public nor one of general interest to the employes of the Federal Government who are working in the various States. It involves only the question—which of the three liability insurance carriers should indemnify Petitioner on account of the payment of a judgment to a person on Federal relief. The so-called Federal employe has himself been paid.

II.

The contract of Respondent excluded liability for injuries to all employes whether imposed by the terms of a Workmen's Compensation Act or on account of the general law of master and servant.

The contract of the Central Surety Company covered liability to all employes whether imposed by the terms of a Workmen's Compensation Act or under the general law relating to master and servant.

At first blush, at least, it would therefore seem that the liability to Andrews was covered by one policy or the other in the absence of estoppels or other defenses. Petitioner

lost its right to have the effect of the decision of the Circuit Court of Appeals, to the effect that Andrews was an employe, considered with respect to the policy of the Central Company by its failure to comply with the rules of that Court.

III.

The decision of the Circuit Court of Appeals was not in conflict with the applicable decisions of the Supreme Court of Iowa.

It is well settled that a servant may be employed generally by one person and at the same time in a particular capacity for another. If such a person is under the exclusive control of the one to whom he is furnished, he becomes the *employe* of that person.

Standard Oil Co. v. Anderson, 212 U. S., 215; 29 Sup. Ct. Rep., 252.
Denton v. Yazoo & Mississippi Valley R. Co., 284 U. S., 305; 52 Sup. Ct. Rep., 141.
Linstead v. Chesapeake & Ohio, 276 U. S., 28; 48 Sup. Ct. Rep., 241.
City of Wichita Falls v. Travelers Ins. Co., (Tex.), 137 S. W. (2) 170.
Norfolk & Western v. Hall (C. C. A. 4), 57 Fed. (2) 1004.

The law of Iowa recognizes this doctrine.

Ash v. Century Lbr. Co., 153 Iowa, 533; 133 N. W., 888.
Norton v. Day Coal Co., 192 Iowa, 160; 180 N. W., 905.
Traynor v. Keefe Con. Co., 199 Iowa, 575; 202 N. W., 218.
Lembke v. Fritz, 223 Iowa, 261; 272 N. W., 300.

In Iowa the test to be applied in determining whether or not a workman is an employe of a particular person is

the right of control with respect to the work to be done and the manner of its performance.

Cases above cited.

It was stipulated by the parties and found by the Court that in these respects Andrews was under the complete control of the Petitioner.

IV.

It is said in the brief that the cases relied on by Respondent merely hold that the rule of *respondeat superior* arises from the right to control; that the status of master and servant may not be so shown. (Petition and Brief, p. 9.)

But the "doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist * * *."

Ash v. Century Lbr. Co., supra, at p. 531.

V.

Nor is it true that the doctrine of the loaned employe is applied only when the doctrine of *respondeat superior* is invoked. It is also applied when the injury is to the loaned employe.

Linstead v. C. & O., 276 U. S., 28; 48 Sup. Ct. Rep., 241.

Norfolk & Western v. Hall (C. C. A. 4), 57 Fed. (2) 1004.

where it is said:

> "The special employer bears, not only the liability to third persons for injuries caused by the servant's negligence, *but also the liability to the servant for injuries suffered by him from the neglect to perform the duties owed him by his master.*" (Italics ours.)

VI.

It also appears from the Iowa cases cited that one of the considerations is: whose work was being done at the time in question?

Traynor v. Keefe Con. Co., 199 Iowa, 575; 202 N. W., 218.
Lembke v. Fritz, 223 Iowa, 261; 272 N. W., 300.

VII.

It has never been held in Iowa that the doctrine of *Oswalt v. Lucas County*, 222 Iowa, 1099, 270 Northwestern Reporter, 817, should be applied where the special employer is a party under no legal obligation to provide relief.

VIII.

The case of *Hoover v. Independent School District*, 220 Iowa, 1364, 264 Northwestern Reporter, 611, upon which the trial Court relied, involved only the question of the right to recover the benefits of the Iowa Workmen's Compensation Act. The basis of the decision was that the work in which he was engaged was being carried on by the Civil Works Administration, and not by the School District. It was reiterated by the Supreme Court in the case of *Ford v. Independent School District*, 223 Iowa, 795, 273 Northwestern Reporter, 870, although the *Ford* case was really decided on the basis that the School District was performing a governmental function.

IX.

Whether or not Andrews could have recovered the benefits of the Iowa Workmen's Compensation Act is immaterial as to whether or not he was an employe within the meaning of Respondent's contract of insurance.

The Supreme Court of Iowa has held in *Knudson v. Jackson*, 191 Iowa, 947, 183 Northwestern Reporter, 391, that the Workmen's Compensation Act did not cover the entire field of master and servant as generally understood at the common law, and quoted with approval from *Rongo v. Waddington & Sons, Inc.*, 94 Atlantic, 408:

> "' ' ' in other words, that it is inapplicable to a condition of things where a servant employed by a master directly is required as part of his contract of employment to work for some other person for a compensation payable not to the servant, but to the immediate master."

ARGUMENT.

I.

AS TO THE CLAIM THAT "MADE WORK" IS NOT PERFORMED AS AN EMPLOYE.

Counsel for Petitioner in their argument make two principal points, the first to the effect that work on a relief project or "made work" is not performed as an employe.

In support of this assertion the Petitioner first relies on the case of *Oswalt v. Lucas County*, 222 Iowa, 1099, 270 Northwestern Reporter, 847; and second upon the assertion that there can be no relation of master and servant except as it arises out of a contract, express or implied.

In so far as the *Oswalt* case is concerned, it is not pertinent here. In the first place Andrews was not working on a project. The Stipulation of Facts, so often referred to, shows that he was assigned to work in the Petitioner's building, under its control and supervision, and to do work assigned *by it*. The Stipulation discloses no project in the building of the Petitioner which the Works Project Administration had assumed to do. He was doing the *work* of *Petitioner* at the time of his injury. The bracket that he

was repairing was an appliance attached to the door leading to the elevator shaft from the basement story. It was work which the Petitioner had undertaken to do for itself and not through the medium of the Works Project Administration.

Moreover, *Oswalt v. Lucas County, supra,* did not involve a private employer. It involved a relation between a person on relief and a political sub-division of the State charged with the statutory duty of providing it.

In addition to the language set forth in the petition for the writ the Supreme Court quoted the following from *McBurney v. Industrial Accident Commission of California,* 30 Pacific (2) 414, at 416:

> "During the time a person is receiving relief under that statute he is *in a sense a ward of the county,* in whose behalf the Legislature has laid the duty upon the county to provide relief, of course only to the extent of its ability to do so. The petitioner had the right to invoke the relief granted, and under the circumstances here shown the county could not deny it. The transaction thus far is in the field of public welfare, *and the essential characteristics* of a contract of hire are not present. * * * *He would receive the relief whether he worked or not.* * * * When the county supports an indigent man, the county *'is entitled to his services and earnings to aid in his support.'* If a *contract for hire* existed, the petitioner would be *entitled to enforce payment* from the funds of the county of the reasonable value of the services rendered. *His status* as here disclosed *would not lend support to such a cause of action;* and we conclude that a contract of hire did not exist between the county and the petitioner at the time in question." (Italics ours.)

There is no decision of our Supreme Court which extends such a rule to one who is *not under a statutory duty* to furnish relief to the indigent or to provide work for such purpose.

In the case at bar the consent that Andrews could work upon the premises of the Petitioner was on condition that he do such work as *it* might designate.

II.

AS TO THE NECESSITY FOR A CONTRACT BETWEEN SERVANT AND BORROWING MASTER.

In this same division of the argument counsel for Petitioner make the assertion that a contract of hire, either express or implied, is a necessary prerequisite to the relationship of master and servant; which, as a general proposition, may be accepted as correct.

It is obvious, however, from the decisions that a person in the general employ of one may temporarily become the servant of another as the result of a contract *not made by him*, but made between his general master and the person to whom he may be loaned. (See cases cited under Points V and VI of the brief.)

It seems to us that it is idle to argue that as a matter of general law a servant may not be loaned by his master to another under circumstances where he becomes the servant of the borrower; and also idle to deny when such a transaction occurs between two masters under circumstances which place the control of the employe in the hands of the borrower that he thereby becomes the servant of the borrower.

The principle was enunciated by this Court in *Standard Oil Co. v. Anderson*, 212 U. S., 215, 29 Sup. Ct. Rep., 252 and applied in the case of *Linstead v. C. & O.*, 276 U. S., 28, 48 Sup. Ct. Rep., 241 in such a way as to impose upon the borrowing master not only the liability for the acts of the borrowed servant, but the liability *to him* on account of the breach of a masterial duty.

The *Linstead* case involved the question of whether the Chesapeake & Ohio or the Big Four was liable for the death of a conductor in the general employ of the Big Four, but who, with his crew, was loaned by the Big Four to the Chesapeake & Ohio. He was killed while hauling a train of the Chesapeake & Ohio over its tracks and while subject to the supervision and control, so far as that work was concerned, of the train-master of the Chesapeake & Ohio. No member of Linstead's crew was subject to discharge by the Chesapeake & Ohio and all members were paid their wages by the Big Four. This Court said:

> "Now the work which was being done here by Linstead and his crew was the work of the Chesapeake & Ohio Railway. It was the transportation of cars, loaded and empty, on the Chesapeake & Ohio Railroad between Stevens and Cincinnati. It was work for which the Chesapeake & Ohio road was paid according to the tariff approved by the Interstate Commerce Commission; it was work done under the rules adopted by the Chesapeake & Ohio Railway Company; and it was done under the immediate supervision and direction of the trainmaster in charge of the trains running from Stevens to Cincinnati, and that trainmaster was a superior employee of the Chesapeake & Ohio road. We do not think that the fact that the Big Four road paid the wages of Linstead and his crew, or that they could only be discharged or suspended by the Big Four, prevented their being the servants of the Chesapeake & Ohio Company for the performance of this particular job."

And also:

> "In the present case there was such a transfer and the line over which the transportation was effected and on which the work of transportation was done by the deceased was the line of the Chesapeake & Ohio, which was the master and remained in charge of the operation, with the immediate supervision of the Big Four crew which was lent for the very purpose of doing the work of the Chesapeake & Ohio."

The Circuit Court of Appeals of the Fourth Circuit in *Norfolk & Western v. Hall*, 57 Fed. (2d), 1004, said:

> "A servant furnished by his general employer to perform a particular service for another *under the latter's control* is to be dealt with as the servant of the latter and not of the former. The special employer bears, not only the liability to third persons for injuries caused by the servant's negligence, *but also the liability to the servant* for injuries suffered by him from the neglect to perform the duties owed him by his master."

It is plain to be seen from these decisions that no direct transaction between the borrowing master and the borrowed servant need be had. In such cases the relation of master and servant is created by a transaction between the two masters. In such cases the question as to which one is the master of the servant whose conduct, or the liability to whom, is questioned is universally held to be,—whose work he was doing and who had control?

III.

THE IOWA DECISIONS ARE TO THE SAME EFFECT AS THE GENERAL LAW UPON THE STATUS OF A BORROWED SERVANT.

The Supreme Court of Iowa recognized this rule in *Ash v. Century Lbr. Co.*, 153 Iowa, 533, 133 Northwestern Reporter, 888. And while it is true that in that case the question was whether or not the defendant was liable for the act of the person claimed to be the borrowed servant in order that the doctrine of *respondeat superior* might be applied, the conclusion was made to turn upon the question of whether or not he was a *borrowed servant* or remained the *servant* of his *general employer.*

In this connection it is appropriate to say here that the contention of counsel for Petitioner that the rule announced

by the Circuit Court of Appeals is resorted to only for the purpose of fixing liability upon one master or the other is captious. It is trite to say that the doctrine of *respondeat superior* springs from certain relations of which that of master and servant is one. The question of whether or not the doctrine is applicable in any particular case is to be determined by finding whether or not there is in existence some of the relation from which it arises. The Supreme Court of Iowa in *Ash v. Century Lbr. Co., supra,* quoted the following with approval from the Court of Appeals of New York:

> "The doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of the wrong at the time and in respect to the very transaction out of which the injury arose. The fact that the party to whose wrongful or negligent act an injury may be traced was at the time in the general employment and pay of another person does not necessarily make the latter the master and responsible for his acts. *The master is the person in whose business he is engaged at the time and who has the right to control and direct his conduct.*" (Italics ours.)

In the opinion in the *Ash* case, in addition to the foregoing quotation, the following significant expressions are to be found:

> "That he is master who has the right of control over the person inflicting the injury at the time it was inflicted."
>
> "The absolute test is not the exercise of the power of control, but the right to exercise the right of control."
>
> "The fact that the party to whose wrongful or negligent act an injury may be traced was at the time in the general employment and pay of another person does not necessarily make the latter the master and respon-

sible for his acts. The master is the person *in whose business* he is engaged at the time and who has the right to control and direct his conduct. Servants who are employed and paid by one person may nevertheless be *ad hoc* the servants of another in a particular transaction, and that too when their general employer is interested in the work."

"These decisions and others, though differing in their facts, fully establish the principle that the owner of the team is responsible for the negligent conduct of the driver where such team and driver have been let to the use of another to do certain work in the performance of which the driver in the management of the team is not under the control of the hirer."

"It is well settled that a servant may be employed generally for one person, and at the same time in a particular capacity for another. This occurs whenever the general employer engages his employe to work for a third person; and whether the employe is the servant of the one or the other in the doing of any particular act depends on which has the right to direct or control him in its performance."

In *Traynor v. Keefe Con. Co.*, 199 Iowa, 575, 202 Northwestern Reporter, 218, it appeared that the defendant, Construction Company, was the general employer of one Action. It had a contract for the construction of a church. A separate contract was entered into by the Castle Electric Company for the electrical work. The Construction Company erected the building and after the same was plastered the Electric Company proceeded to carry out its contract. The Construction Company had erected for its own use a scaffolding inside the building. When the Electric Company came on the job it used such scaffolding of the Construction Company. It directed Action, who was a general employe of the Construction Company, to make some additions to the scaffolding. He attached some brackets which supported planks for the use of the employes of the Electric Company. One of the brackets broke while Traynor,

an Electric Company employe, was using it, and he died of the injuries received as a result of a fall. It was contended that Action, in adding the brackets to the scaffolding, was acting as an employe of the Keefe Construction Company by which he was generally employed.

The Supreme Court, after quoting from *Ash v. Century Lbr. Co., supra,* said:

> "Upon application of the rules heretofore stated, it seems unquestionable that the work of Action in constructing the additions to the scaffolding was the *work* of the *electric company,* and not of the construction company. The electric company *assumed to and did direct* him as to the construction work, and the construction company did not even know that it was being done. Under this situation of facts, it cannot be doubted but that in what he did, Action was working *as the employe* of the electric company, and not of the construction company." (Italics ours.)

So it appears that in these cases in which the question has been considered by the Supreme Court of Iowa the application of the doctrine of *respondeat superior* has followed from, and not independently of, the finding of the relation of employer and employe.

The other Iowa cases cited in the brief are to the same effect.

IV.

AS TO *HOOVER V. INDEPENDENT SCHOOL DISTRICT*, 220 IOWA, 1364, 264 N. W., 611, AND OTHER CASES ARISING UNDER THE WORKMEN'S COMPENSATION ACT.

Petitioner also relies upon the case of *Hoover v. Independent School District*, 220 Iowa, 1364, 264 Northwestern Reporter, 611; and in that connection on page 12 of the brief quotes what purports to be the testimony of I. S. Jackson

taken upon the trial of that case. The purported excerpt from the abstract in the *Hoover* case is *not part of the record here.*

It will be noted, however, from the quotation from the opinion of the Iowa Court on pages 12, 13, and 14 of Petitioner's brief that it was a proceeding to recover the benefits of the Workmen's Compensation Act; and did not involve the question whether or not the plaintiff was employed by the School District in the sense of the *common law.* It will be noted that in the quoted portion of the opinion there is a reference to the case of *Knudson v. Jackson,* 191 Iowa, 947, 183 Northwestern Reporter, 391; and also that the question for decision as stated is confined to whether or not a person is an employe *within the meaning of the Workmen's Compensation Act.* It is there stated that the test which the Court adopted in *Knudson v. Jackson* would exclude a loaned employe as an employe of the person to whom he was loaned *for the purpose of the Compensation Act.*

The Court went on to say, however, as appears from the quotation on page 13 of the brief, that the project on which the men were working was carried on as a Civil Works project as distinguished from a School District project; that the workers employed were told when and where to work and were paid for their wages by the Civil Works Administration. It also referred to the fact that representatives of the School District were present to see that the completed job conformed to its plan and held that such fact is not controlling; and then concluded by saying:

> "The workmen, therefore, were actually working for the Civil Works Administration when their injuries were received, and the rule of the loaned employe, even if recognized by us, would not apply."

A later case was brought, entitled *Ford v. Independent School District*, 223 Iowa, 795, 273 Northwestern Reporter, 870, to recover damages for the same injuries for which the Workmen's Compensation benefits were sought in the *Hoover* case. A demurrer was sustained by the trial Court on the ground that the School District was acting in a governmental capacity. The Supreme Court affirmed the judgment. In this opinion the Court reiterated its finding in the *Hoover* opinion that the plaintiffs were actually "working for the Civil Works Administration when their injuries were received, and that the rule of the loaned employe, * * * would not apply." In other words the Court in its opinion in the *Ford* case recognized that in the *Hoover* case there was *no loaning* of an employe. The effect is the same as if the Court had found that the Civil Works Administration was working as an independent contractor.

In the case of *Knudson v. Jackson, supra*, it was *not* held that the *relation of master and servant could not arise from an arrangement between two masters.* It simply held that a loaned employe was not entitled to the benefits of the Workmen's Compensation Act because *he* had made no contract with the borrowing master.

The Court limited the application of the Workmen's Compensation Act to a field narrower in its scope than the ordinary concept of that relation. The facts of the case were that Jackson was in the general employ of one C. M. Knight. Knight had furnished Jackson and a team to the defendant, Knudson, to haul rubbish in connection with the performance of a contract which Knudson was carrying out as a contractor and builder. There is no statement in the opinion which throws any light on the question as to whether or not Knudson had the right to control Jackson. It is said in the opinion:

> "According to instructions from Knight, Jackson appeared on the Knudson job, and was put to work by Knudson's foreman in hauling rubbish. Jackson was so engaged for a period of about two weeks, during which time he received instructions from Knudson's foreman as to the particular work he was to do. Knight paid Jackson at the end of each week. Jackson had no knowledge whatever of the arrangements between Knudson and Knight. While engaged on the Knudson job, Jackson received the injury for which compensation is sought." (from Knudson.)

The Court called attention to the definition of "employe" as used in the Workmen's Compensation Act to be "any person who has entered into the employment of or works under contract of service, express or implied, for an employer." And said:

> "The statute creates rights and liabilities *not recognized at common law.* It must be construed for the purpose of effectuating the legislative intent. We cannot by judicial construction *enlarge* upon the express provisions of the statute. The legislature has seen fit to define who is an employe, *within the meaning of this act,* and one who seeks to avail himself, as an employe, of its provisions must come within the terms of the statute." (Italics ours.)

The Court then quoted with approval the following from *Rongo v. Washington & Sons,* 94 Atlantic Reporter, 408:

> "We think it would be an unreasonable strain upon this language to hold that it is applicable to any relation of master and servant, *as generally understood at the common law,* other than that arising out of a contract *between the master and the servant,* whereby the servant engages to work for the master, *and the master on his part engages to pay the servant for such work;* in other words, that it is *inapplicable to a condition of things where a servant employed by a master* directly is required, as part of his contract of employment, *to work for some other person* for a compensation payable, not to the servant, but to the immediate master." (Italics ours.)

And then in deciding the case the Court used the following language:

> "We recognize and adhere to the rule that this statute should be liberally construed. This, however, does not permit us to *enlarge* the express terms of the act. Our legislature has seen fit to define who is an employer and who is an employe, *within the meaning of this act.* The legislature has expressly said that an employe *who is entitled to compensation* under this act is 'any person who has entered into the employment of or works under a contract of service, express or implied, for an employer.' In view of this definition and declaration by the legislature, we *cannot enlarge* the terms and provisions of this statute, and apply to an employer and employe the rules and *definitions of the common law, as applicable to master and servant.* The legislature, in enacting this statute, was providing a remedy wholly unknown to the common law, and it saw fit to place in the statute definitions *to which rules of the common law can have no application.* We are, therefore, in an entirely different situation from the Supreme Court of California, in declaring that the definitions of employer and employe, under the Workmen's Compensation Law of that state, 'are broad enough to include both the general and special employer.' Our legislature has expressly said that an employe, within the meaning of this act, in order to come under this statute, must have a contract of service, express or implied, *with the employer who is sought to be charged with liability.* This language is clear and explicit. Applying it to the facts of the instant case, there was no contract of service, express or implied, *between the claimant,* Jackson, and the so-called 'special employer', Knudson. There was a contract of service between the claimant and his 'general employer,' Knight. He had no contract of services, express or implied, with any other person than Knight." (Italics ours.)

So it appears that the Iowa Supreme Court in limiting the application of the Workmen's Compensation Act adopted the narrow view that an employe within its meaning could only be one who made his contract directly with

his master and received his pay therefrom. It is therefore clear that neither the decision in this case nor in the *Hoover* case holds that a person may not become the servant of one to whom he may be loaned by his general employer. They merely hold that such persons are not entitled to the benefits of the Workmen's Compensation Act; they do not overrule the prior decisions that a person in the general employ of one master may become the employe of another as the result of an arrangement between the two masters.

The opinion in *Knudson v. Jackson, supra,* plainly shows that the Court recognized that its construction of the Compensation Act was such as to limit its application to *something less than the common law concept of the relation of master and servant.*

The Circuit Court of Appeals adopted this view, which was, we submit, entirely consistent with the decisions of our Iowa Court. Andrews was *employed* by Petitioner because he was doing its work and under its complete control.

CONCLUSION.

And so we submit that the petition for writ of certiorari does not present a question of sufficient substance to warrant its issue for the purpose of a review by this Court. It is not true, as Petitioner says in its closing sentence, that one insurer escaped because he was not an employe and the elevator insurer because he was. The fact is that the elevator insurer was exonerated because he was employed by the Petitioner; the insurer which issued the Workmen's Compensation and Employers' Liability policy escaped because the petitioner did not properly present its appeal to the Circuit Court of Appeals.

As we have said before, the question is not of concern to Works Progress Administration workers. It involves only the liability of indemnity insurance carriers.

We respectfully submit that the issue of a writ of certiorari should be denied.

Respectfully submitted,

DONALD EVANS,

WM. F. RILEY,

EHLERS ENGLISH,

Attorneys for Respondent, New York Casualty Company.